COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts	D.T.E. 01-20

MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

AT&T Communications of New England, Inc. ("AT&T") requests that the Department of Telecommunications and Energy (the "Department") grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D. Specifically, AT&T requests that the compact disk attached to AT&T's supplemental response to VZ-ATT 1-26, filed on September 21, 2001, be granted protective treatment because it contains the competitively sensitive and highly proprietary clustering algorithm program developed by TNS Telecoms ("TNS") (formerly PNR Associates, Inc.). In addition, AT&T requests that AT&T's supplemental response to VZ-ATT 1-21 be granted protective treatment because it contains proprietary data belonging to Metromail, Inc. ("Metromail") which was provided to AT&T by TNS.

The clustering algorithm program and the supplemental response to VZ-ATT 1-21 have already been provided to the Department and to Verizon, and will be made available to those parties which have signed a protective agreement with AT&T in this docket. The clustering algorithm program and the supplemental response to VZ-ATT 1-21 should not, however, be

placed in the public record because competitors of TNS and Metromail would be able to use the information to gain an unfair competitive advantage over TNS and Metromail, neither of which is a party to, or has any financial interest in, this proceeding. Failure to protect such information will make it extremely difficult for parties to gain assent from third-parties for the release of their intellectual property in Department proceedings.

I. LEGAL STANDARD.

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

The Department has recognized that competitively sensitive information is entitled to protective status. *See, e.g., Hearing Officer's Ruling On the Motion of CMRS Providers for Protective Treatment and Requests for Non-Disclosure Agreement*, D.P.U. 95-59B, at 7-8 (1997) (the Department recognized that competitively sensitive and proprietary information should be protected and that such protection is desirable as a matter of public policy in a competitive

market). In determining whether certain information qualifies as a "trade secret,"[1] Massachusetts courts have considered the following:

> (1) the extent to which the information is known outside of the business;
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> (2) the extent to which it is known by employees and others involved in the business;
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> (3) the extent of measures taken by the employer to guard the secrecy of the information;
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> (4) the value of the information to the employer and its competitors;
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> (5) the amount of effort or money expended by the employer in developing the information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. *Crampton*, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has "the right to keep the work which it had done, or paid for doing, to itself." Similarly, courts in other jurisdictions have found that "[a] trade secret which is used in one's business, and which gives one an opportunity to obtain an advantage over

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[1] Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc.* v. *James Murphy and Son, Inc.*, 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a trade secret need not be a patentable invention." *Jet Spray Cooler, Inc.* v. *Crampton*, 385 N.E.2d 1349, 1355 (1979).

competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one's competitors were compelled." *Mountain States Telephone and Telegraph Company* v. *Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).

II. ARGUMENT.

A. The Clustering Algorithm Program Attached to AT&T's Supplemental Response to VZ-ATT 1-26 Should be Granted Protective Treatment.

The clustering algorithm program attached to the supplemental response to VZ-ATT 1-26 is competitively sensitive, proprietary and a trade secret of TNS. The clustering algorithm program was developed by TNS at TNS's expense for its own use. The program is not publicly available, is not shared with non-TNS employees and is not considered public information. In fact, the program's software has never been released by TNS prior to this occasion. Only two TNS employees have access to the program, the development of which took approximately four months of effort by one individual. The clustering algorithm program is a valuable product that competitors of TNS could unfairly use to their own advantage. Should the program be released to the public, TNS competitors would not have to spend the time and money to develop a similar software tool.

TNS's clustering algorithm program is exactly the type of information that G.L. c. 25, § 5D was designed to protect and that the Department has traditionally protected. The Department recently offered to provide protective treatment to similar third-party information which Verizon was compelled to produce in the *Alternative Regulation* proceeding. *See Hearing Officer Ruling*, D.T.E. 01-31 Phase I (September 14, 2001), at 9. The Department should grant AT&T the same protective treatment that it has offered to Verizon.

B. AT&T's Supplemental Response to VZ-ATT 1-21 Should Be Granted Protective Treatment.

The supplemental response to VZ-ATT 1-21 contains competitively sensitive and proprietary information based on data belonging to Metromail which TNS has provided to AT&T for purposes of responding to this information request. TNS has entered into a contract with Metromail in which TNS has agreed not to release data provided to TNS by Metromail. Pursuant to the agreement, TNS has never released the Metromail data and even severely restricts the access of its own employees to this data. At present, only two TNS employees have access to the Metromail data.

Furthermore, it is AT&T's understanding that this information was developed by Metromail for its own use at significant expense. These data are not considered public information and access to it is limited. The data are a valuable Metromail asset that Metromail's competitors could unfairly use to their own advantage. Indeed, these data more than meet the standard definition of "trade secrets."

Because the supplemental response to VZ-ATT 1-21 contains third-party proprietary data subject to the TNS-Metromail confidentiality agreement, and which is extremely valuable and proprietary to Metromail, the Department should accord it protective treatment.

Conclusion.

For these reasons, AT&T requests in accordance with G.L. c. 25, § 5D, that the Department grant protective treatment to the clustering algorithm program attached to AT&T's supplemental response to VZ-ATT 1-26 and to ATT's supplemental response to VZ-ATT 1-21.

Respectfully submitted,

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